

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

<p>ADAPTIX, Inc.,</p> <p>v.</p> <p>APPLE, INC., <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. 5:13-cv-01777-PSG</p> <p>DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT</p> <p>Hearing Date: November 4, 2014 Time: 1:00 p.m. Courtroom 5, 4th Floor Magistrate Judge Paul S. Grewal</p>
<p>ADAPTIX, INC.,</p> <p>v.</p> <p>AT&T MOBILITY LLC, <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. 5:13-cv-01778-PSG</p> <p>DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT</p> <p>Hearing Date: November 4, 2014 Time: 1:00 p.m. Courtroom 5, 4th Floor Magistrate Judge Paul S. Grewal</p>
<p>ADAPTIX, INC.,</p> <p>v.</p> <p>APPLE INC., <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. 5:13-cv-02023-PSG</p> <p>DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT</p> <p>Hearing Date: November 4, 2014 Time: 1:00 p.m. Courtroom 5, 4th Floor Magistrate Judge Paul S. Grewal</p>

**DEFENDANTS AT&T, APPLE, AND HTC'S REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OF NON-INFRINGEMENT: NO "SELECTING A SET OF
CANDIDATE SUBCARRIERS"**

TABLE OF CONTENTS

		Page
1	I. Introduction.....	1
2	II. There is no claim construction dispute.....	2
3	III. There is no genuine factual dispute that would preclude summary judgment.....	3
4	IV. No reasonable jury could find that the act of “providing feedback” on all subbands— each and every time—constitutes “selecting.”.....	4
5	V. Adaptix conflates the separate claim limitations “selecting” and “providing feedback.”	5
6	A. The asserted claims and patent specification describe “selecting” and “providing feedback” as separate actions.....	5
7	B. Adaptix mischaracterizes the embodiments disclosed in the specification.	6
8	C. [REDACTED] does not and cannot constitute “the subscriber selecting a set of candidate subcarriers.”	7
9	D. Adaptix cannot reconcile its theory that [REDACTED] infringes with its admission that Mode 1 does not infringe.	9
10	VI. The Court should not reconsider its order striking Adaptix’s untimely [REDACTED] theory.....	10
11	VII. Conclusion	10
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ramsey Grp., Inc. v. EGS Int'l, Inc.</i> , 329 F. Supp. 2d 630 (W.D.N.C. 2004)	8
<i>Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.</i> , 340 F.3d 1298 (Fed. Cir. 2003)	8
STATUTES	
Civil L.R. 7-9	10

1 **I. INTRODUCTION**

2 Adaptix's opposition fails to raise any genuine issue of material fact that precludes summary
 3 judgment of noninfringement.¹

4 *There is no claim construction dispute.* As Defendants acknowledged at the *Markman* hearing,
 5 the limitation "selecting a set of candidate subcarriers" can be met by choosing a portion of or all of
 6 the subcarriers, as the set of candidate subcarriers. To "choose" all subcarriers, however, there must be
 7 an option to choose less than all. Otherwise there is no choice. Adaptix's opposition seeks to render
 8 the parties' agreed-upon construction of the term "selecting" (construed to be "choosing") meaningless
 9 by arguing that a subscriber unit that lacks choices nevertheless meets the asserted claims. Adaptix is
 10 reading the "selecting" element out of the claim.

11 *There is no dispute over those aspects of the accused products' operations relevant to this*
 12 *motion.* The parties do not dispute that in [REDACTED]
 13 [REDACTED].

14 The only dispute, which the Court should decide as a matter of law, is whether a subscriber unit
 15 that has no option but to [REDACTED], nevertheless, meets the
 16 "selecting" limitation. Because the accused subscriber units have no choices, no reasonable jury could
 17 find that the accused subscriber devices perform the step of "selecting a set of candidate subcarriers."

18 In arguing that the accused subscriber devices "select" all subcarriers simply by [REDACTED]
 19 [REDACTED], Adaptix improperly conflates the steps of "the subscriber *selecting* a set of
 20 candidate subcarriers" and "the subscriber *providing feedback* information on the set of candidate
 21 subcarriers" in the asserted claims. While the specification includes examples of providing feedback

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 28 ¹ Defendants have filed two separate reply briefs: one for the cases involving AT&T and one for the
 cases involving Verizon. These briefs are largely identical, but the reply brief in the Verizon cases
 responds to a unique argument regarding Dr. Andrews made only in Adaptix's opposition brief for the
 Verizon cases.

1 information for all subcarriers, in each of those examples, the subscriber first has performed the
2 independent step of selecting the set of candidate subcarriers and, crucially, has the option to select
3 fewer than all subcarriers. But the asserted patents never disclose a subscriber that is required to select
4 every subcarrier every time.
5

6 The relevant issue, therefore, is whether the accused subscriber devices perform some action—
7 besides the separately claimed step of providing feedback—that constitutes making the choice that all
8 subcarriers will be in the “set of candidate subcarriers.” Adaptix and its expert, Dr. Caloyannides,
9 failed to identify any such action. Indeed, as Dr. Caloyannides conceded at deposition: “
10 [REDACTED]
11 [REDACTED].” Ex. 18, 9/13/14 Caloyannides Tr. at 23:3-5 (emphasis added).
12 Consequently, the Court should grant summary judgment of non-infringement.
13

14 **II. THERE IS NO CLAIM CONSTRUCTION DISPUTE.**

15 There is no disagreement over the proper construction of the term “selecting a set of candidate
16 subcarriers,” and the Defendants are not asking the Court to change its construction. To begin, the
17 parties agree that the term “selecting” means “choosing,” and this construction was adopted by the
18 Court. C.A. -1778, D.I. 147 at 2; C.A. -1778, D.I. 160 at 2. The parties also agree that the asserted
19 claims cover methods where, among other things, the subscriber unit can choose all of the subcarriers
20 as the “set of candidate subcarriers.” Contrary to Adaptix’s assertion, however, Defendants are not
21 attempting to read out a preferred embodiment of the patents-in-suit, where the subscriber chooses all
22 subcarriers to be within the set of candidates, and then reports on all subcarriers. *See* C.A. -1778, Opp.
23 Br. D.I. 338 at 5. Nor are Defendants seeking to limit the claims to cover only methods where the
24 subscriber unit chooses a “subset” of subcarriers as the “set of candidate subcarriers.” Indeed, at the
25 *Markman* hearing, Defendants specifically acknowledged that the claims cover methods where the
26 chosen “set of candidate subcarriers” could be either all or a portion of the subcarriers:
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1 A set could constitute **all the subcarriers**. A set could also constitute a **portion of the**
2 **subcarriers**. We don't think there's any reason to introduce this concept of subset into
the construction.

3 (C.A. -1778, D.I. 307-18 (Ex. 17 to Opening Motion) Markman. Tr. at 30:23-31:15 (emphasis added);
4 *see also id.* at 22:11-18. Therefore, there is no claim construction dispute, nor any reason to revisit the
5 Court's claim construction.

6 Adaptix attempts to fabricate a claim construction issue by arguing that “[t]he specification
7 discloses [an] alternative embodiment[where] the device is programmed to select as candidates “all”
8 of the subcarriers.” Opp. Br. at 1. That is incorrect. The specification does not disclose any
9 embodiment where the subscriber provides feedback information for all subcarriers without an option
10 of choosing fewer than all of those subcarriers. Instead, consistent with the claims, every embodiment
11 describes that the subscriber unit makes measurements on the subcarriers and then performs an
12 evaluation on those measurements to determine which subcarriers will be selected. *See, e.g.*, '748
13 patent at 3:7-19; 5:37-55; 7:49-57; 8:15-18; 8:55-65; 9:27-40; 9:41-42; 9:57-64; 10:19-22; 10:31-41;
14 12:3-5; 15:55-56. Consistent with the claims, and all of these embodiments, the subscriber may select
15 all or just a portion of the subcarriers as candidates. There is always a choice to be made by the
16 subscriber.

17 **III. THERE IS NO GENUINE FACTUAL DISPUTE THAT WOULD PRECLUDE**
SUMMARY JUDGMENT.

18 The parties do not dispute the relevant operations of the accused products or the scope of
19 Adaptix's infringement theories. First, only [REDACTED] is accused of infringement. Second, it is
20 undisputed that the use of Mode 1 does not infringe. Third, there is no dispute that an accused device
21 [REDACTED]
22 [REDACTED]. Adaptix's sole infringement argument is that, because the accused
23 subscriber devices [REDACTED]

1 [REDACTED] as the “set of candidate subcarriers.” Adaptix’s infringement expert admitted at
2 deposition that he has no other infringement theory:

3 Q. And I understand that your infringement theory for this claim element is that the
4 accused UE devices perform the step of selecting a set of candidate subcarriers by
5 [REDACTED]. Is that correct?

6 A. That is correct.

7 Q. And your theory is that [REDACTED]
8 [REDACTED]. Is that correct?

9 A. That is correct. . . .

10 [Q.] It is not your theory that the [REDACTED]
11 [REDACTED]?

12 A. No. [REDACTED].

13 Q. In each and every time?

14 A. That is correct.

15 Ex. 18, 9/13/2014 Caloyannides Tr. at 9:18-10:18. Adaptix’s expert expressly disavowed the theory
16 that only certain (fewer than all) subbands are candidates.² *Id.*

17 **IV. NO REASONABLE JURY COULD FIND THAT THE ACT OF “PROVIDING
18 FEEDBACK” ON ALL SUBBANDS—EACH AND EVERY TIME—CONSTITUTES
“SELECTING.”**

19 As explained above, Defendants do not dispute that a subscriber that affirmatively *chooses* all
20 of the subcarriers can satisfy the claim limitation “selecting a set of candidate subcarriers.” But to
21 “choose,” there must be options from which to choose. Under the 3GPP LTE standard, a subscriber
22 device operating in [REDACTED]

23 [REDACTED] without selecting any as candidates. By contrast, LTE’s [REDACTED]

24 _____
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26 ² Nonetheless, Adaptix’s counsel seems to still embrace the stricken theory as viable. As discussed
27 below, Adaptix argues that it should be allowed to “reassert the backup theory” of infringement that
28 the Court previously struck from Dr. Caloyannides’ infringement report. (See Opp. Br. at 9 (“Adaptix
and its expert) should be given the opportunity to reassert the backup theory articulated earlier this
year.”)).

1 [REDACTED] permits the subscriber device to “select” specific subbands on which to
 2 report. (C.A. -1778, D.I. 307-12 (Ex. 11 to Opening Motion) at § 7.2.1.)

3 Adaptix mischaracterizes Defendants’ position by suggesting that “Defendants argue that
 4 because they have [REDACTED]

5 [REDACTED]” (Opp. Br. at 5.) Defendants argue no
 6 such thing. As noted, under the 3GPP LTE standard, [REDACTED]

7 [REDACTED] The absence of choice is not the same as “choosing all.”

8

9 **V. ADAPTIX CONFLATES THE SEPARATE CLAIM LIMITATIONS “SELECTING”
 10 AND “PROVIDING FEEDBACK.”**

11 **A. The asserted claims and patent specification describe “selecting” and “providing
 12 feedback” as separate actions.**

13 The patents make clear that “selecting” and “providing feedback” are different steps. For
 14 example, among other limitations, claim 8 of the ‘748 Patent requires both:

- 15 • “the subscriber selecting a set of candidate subcarriers”; and
- 16 • “the subscriber providing feedback information on the set of candidate subcarriers to the
 17 base station.”³

18 Adaptix mischaracterizes Defendants’ position, stating “[T]he device **reports** on a set of
 19 candidate subcarriers. [REDACTED]

20 [REDACTED] . . .” (Opp. Br. at 7 (internal citations removed).) Defendants do not agree that providing
 21 feedback constitutes selecting. Those are distinct actions and separately claimed limitations; the claim
 22 language separately requires the subscriber to perform the steps of “selecting” and “providing
 23 feedback.” (’748 patent at 17:65-18:3 (claim 8).) During claim construction, Adaptix acknowledged
 24 that “selecting” and “providing feedback” are separate steps. (See C.A. -1778, Dkt. 150, Opening
 25 Claim Construction Brief at 8 (“[T]he subscriber ‘chooses’ a set of candidate subcarriers. The

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 28 ³ The other asserted independent claim, claim 1 of the ‘212 patent, contains the same steps, though it
 recites “subscriber unit” in lieu of “subscriber.”

1 subscriber then provides feedback by ordering the subcarriers as clusters. . . . Thus, it is clear that the
 2 “choosing” in the claims involves the earlier selection of candidate subcarriers [by the subscriber], not
 3 the later feedback on candidate clusters.”).) And the Court properly construed “selecting” to mean
 4 “choosing,” not “providing feedback on.”
 5

6 Adaptix’s infringement expert Dr. Caloyannides similarly conceded in deposition that (1)
 7 “selecting” and “providing feedback” are different steps, and (2) providing feedback by sending CQI
 8 values does not amount to “selecting” a set of candidate subcarriers. (C.A. -1778, D.I. 306-15 (Ex. 16
 9 to Opening Motion), 9/12/14 Caloyannides Tr. at 344:14-15 (“A. Selection is totally separate from
 10 measurement and from sending.”); *id* at 345:10-11 (“A. Neither the measurement nor the sending
 11 amounts to selecting.”).)

12 **B. Adaptix mischaracterizes the embodiments disclosed in the specification.**

13 Adaptix improperly conflates the separate “selecting” and “providing feedback” limitations,
 14 and effectively reads the “selecting” limitation out of the claims. For instance, Adaptix
 15 mischaracterizes the patent’s disclosure regarding providing feedback as disclosure regarding
 16 selecting. (*See* Opp. Br. at 6.) In doing so, Adaptix relies on several embodiments concerning
 17 feedback on “clusters” of subcarriers, even though the asserted claims do not recite a subscriber unit
 18 selecting or providing feedback on “clusters.” (*See, e.g.*, Opp. Br. at 6 (citing ’748 patent at 5:53-55,
 19 7:54-58, and 8:63-65).) Adaptix’s reliance on these cited portions of the specification only serves to
 20 confirm that the acts of “selecting” and “providing feedback” are in fact separate and independent
 21 steps.
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23 For instance, Adaptix quotes the portion of a specification that states “[i]n one embodiment,
 24 each subscriber measures the SINR *of each subcarrier cluster* and reports these SINR measurements
 25 to their base station through an access channel.” (*See* Opp. Br. at 6 (emphasis in original) (citing ’748
 26 patent at 5:53-55).) But the immediately prior sentence shows that a selection of preferred clusters has
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already occurred: “The selection results in each subscriber *selecting clusters* they would prefer to use based on the measured parameters.” (’748 patent at 5:50-52 (emphasis added).) In context, these passages refute Adaptix’s contention that the patents disclose an embodiment where the subscriber must select all subcarriers every time.⁴

Finally, nowhere does the specification disclose “*selecting* as many subbands as possible, and preferably *selecting* all,” as Adaptix contends. (Opp. Br. at 5.) Adaptix’s only support for this statement is paragraph 23 of Dr. Caloyannides’ declaration, which says nothing about the patent specification, and only describes [REDACTED] reporting generally.

C. [REDACTED] does not and cannot constitute “the subscriber selecting a set of candidate subcarriers.”

Neither Adaptix nor its expert identifies any action performed by the accused devices that constitutes a “selection.” In his report and in his deposition, Adaptix’s expert identified an action allegedly corresponding to the claimed “measuring” step and an action allegedly corresponding to the claim step of “providing feedback.” (C.A. -1778, D.I. 306-15 (Ex. 16 to Opening Motion) 9/12/14 Caloyannides Tr. at 343:11-19.) But he did not identify any action that constituted a “selection” of subcarriers, and he conceded that “[n]either the measurement nor the sending [of feedback] amounts to selecting.” (*Id.* at 345:10-11.)

When asked whether the accused devices perform the required selection, Adaptix’s expert Dr. Caloyannides testified that he was not familiar with the source code and therefore could not identify any action that constitutes the claimed selection. (*See id.* at 344:22-15 (“Q. Can you give me any information at all as to what the UE does, what action it takes, to perform that selection that is not

⁴ Similarly, Adaptix takes a portion of a sentence from the specification out of context stating, “[i]n one embodiment, the SINR on *each cluster* is reported to the base station, through an access channel.” (Opp. Br. at 6 quoting ’748 patent at 8:63-65 (Adaptix’s emphasis).) But the preceding text (not discussed by Adaptix) describes, consistent with the rest of the patent, that measurements are taken (’748 Patent at 8:48-54) and that the subscriber unit makes a reasoned selection. *Id.* at 8:55-59.

1 measurement and that is not sending the report? A. Oh, I'm not familiar with the software in the UE to
 2 tell you that.”). When asked a similar question during a separate deposition, Dr. Caloyannides went
 3 on to concede: [REDACTED]

4 [REDACTED].” (Ex. 18, 9/13/14 Caloyannides Tr. at
 5 23:3-5 (emphasis added).)

6 Faced with these indisputable facts, Adaptix has now provided a new declaration from Dr.
 7 Caloyannides that offers ***for the first time*** the conclusory assertion that the accused devices “satisfy the
 8 ‘selecting’ step when [REDACTED]”
 9 (Caloyannides Decl. at ¶25 (cited in Opp. Br at 8).) Dr. Caloyannides’ unsupported opinion was not
 10 disclosed in Dr. Caloyannides’s expert report and contradicts his sworn deposition testimony that (*inter*
 11 *alia*) he is “not familiar with the software in the UE to” “give any information at all as to what the UE
 12 does, what action it takes, to perform that selection that is not measurement and that is not sending the
 13 report.” (C.A. -1778, D.I. 306-15 (Ex. 16 to Opening Motion) 9/12/14 Caloyannides Tr. at 344:22-
 14 345:2.) “A party may not submit affidavits purporting to create genuine issues of fact if the affidavits
 15 contradict prior sworn testimony.” *Ramsey Grp., Inc. v. EGS Int'l, Inc.*, 329 F. Supp. 2d 630, 638
 16 (W.D.N.C. 2004) (citing *Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298
 17 (Fed. Cir. 2003)). For at least these reasons, the Court should disregard Caloyannides’ late
 18 declaration.⁵ *See id.* (“Where an expert’s declaration contradicts previous sworn testimony, it is proper
 19 for the Court to strike or refuse to consider the same.”).

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 24⁵ Paragraph 25 of Dr. Caloyannides’ declaration states: “accused devices satisfy the ‘selecting’ step
 25 when [REDACTED].” This opinion was not disclosed in Adaptix’s infringement contentions or in Dr. Caloyannides’s expert report. Nor did Dr. Caloyannides disclose this opinion during any of his numerous depositions. Tellingly, Dr. Caloyannides’ declaration claims “CQI values” are selected, but offers no explanation of what would constitute the “set of candidate subcarriers” present in the step of “the subscriber selecting a set of candidate subcarriers.” Dr. Caloyannides’ new and conclusory opinion should be disregarded by the Court.

1 Regardless, even Dr. Caloyannides' belated declaration illustrates that the accused devices do
2 not perform the "selecting" limitation (as distinguished from the "measuring" and "providing
3 feedback" steps). That is, "██████████" (Caloyannides Decl. at ¶25) is nothing more than "measuring" channel quality and "providing
4 feedback," two steps that Caloyannides concedes are *not* selecting. (C.A. -1778, D.I. 306-15 (Ex. 16 to
5 Opening Motion), 9/12/14 Caloyannides Tr. at 345:10-11 ("A. Neither the measurement nor the
6 sending amounts to selecting.").) Adaptix's infringement contentions confirm as much. (*See, e.g.*, Ex.
7 19, Infringement Contentions for '212 Patent, Adaptix v. HTC, at 7 ("The Accused Products measure
8 these reference signals to derive channel and interference information. . . . This helps the Accused
9 Products determine signal-to-interference-plus-noise ratios ("SINRs"), which are reported as a CQI
10 values.").)

11 **D. Adaptix cannot reconcile its theory that █████ infringes with its admission that
12 █████ does not infringe.**

13 Adaptix's infringement theory for █████ is inconsistent with its admission that █████ does
14 not infringe. █████, as Adaptix contends (e.g., Opp. Br. at 7), then █████ would infringe, because in █████
15 █████ (C.A. -1778, D.I. 307-12 (Ex. 11 to Opening Motion) at §7.2.2.) But Adaptix concedes that █████ does not infringe. (Opp. Br. at 4.)
16 Adaptix's admission that the accused devices operating in █████ do not select a set of candidate
17 subcarriers (i.e., do not "██████████" subcarriers) applies with equal force to Adaptix's theory regarding
18 Mode 3. In █████
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VI. THE COURT SHOULD NOT RECONSIDER ITS ORDER STRIKING ADAPTIX'S UNTIMELY [REDACTED] THEORY.

Adaptix requests that the Court reconsider its prior Order granting Defendants' motion to strike new infringement theories (in order to allow Adaptix to reassert its untimely "selecting some" theory of infringement) in the event that the Court narrows its claim construction. Adaptix's request should be denied for three reasons. ***First***, Adaptix's justification for reconsideration does not apply because Defendants are not seeking to modify the Court's claim construction (*see Sec. II above*). ***Second***, it would make even less sense now to allow Adaptix to assert its "selecting some" theory, because Adaptix's expert Dr. Caloyannides expressly disavowed that theory during his deposition. *See, e.g.*, *supra*, Sec. III (block quoting Ex. 18, 2014-09-13 Caloyannides Tr. at 9:18-10:18 ("[Q.] [REDACTED]
[REDACTED]
[REDACTED]")). ***Third***, Adaptix fails to comply with Civil L.R. 7-9 and does not even attempt to show the "exercise of reasonable diligence," the emergence of new facts or law, or the "manifest failure" of the Court to consider Adaptix's original positions. Civ. L.R. 7-9. Therefore, there is no reason for the Court to reconsider its Order on Defendants' motion to strike. (C.A. 5:13-cv-1778, D.I. 267.)

VII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion for summary judgment of non-infringement of all asserted claims of the '748 and '212 patents.

Dated: October 31, 2014

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1 *Attorneys for Defendant and*
2 *Counterclaim-Plaintiff Apple Inc.*

1 **ATTESTATION OF E-FILED SIGNATURE**

2 Pursuant to Civil Local Rule 5-1(i)(3), the attorneys signing above for defendants Apple Inc.,
3 AT&T Mobility LLC, and HTC Corporation, HTC America, Inc. attest that they have each obtained
4 the concurrence of the other defendants for purposes of filing these papers on behalf of the respective
5 parties in coordinated Case Nos. 5:13-cv-1777, 5:13-cv-1778, and 5:13-cv-02023.
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